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The human rights protection system in Southeast Asia and ASEAN

Netipatalachoochote, Stanati

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CHAPTER ONE

Introduction

1. What are Human Rights and Their Protection Systems? Why are They Important?

The concept of human rights is basically recognized to mean that every human being—man or woman, adult or child, rich or poor, healthy or sick, educated or not— is a right-holder.¹ However, the definition of human rights as identified by people on the street, human rights activists, government officials, and regional and international organizations may be different.² Scholarly, the common definition of human rights was said to be popularized by Jack Donnelly.³ Donnelly construes a right as an entitlement and formulates human rights as “literally the rights that one has simply because one is a human being.” He ascribes three other special features to human rights. First, human rights are equal rights because one is either a human being or not a human being. Those which are human beings have the same rights as any other human being. Second, human rights are inalienable rights. In the words of Tremblay et. al, who also subscribe to Donnelly’s definition of human rights, the inalienability of human rights means that “*although they may be violated, a person’s rights cannot be surrendered or erased*”.⁴ Third, human rights are universal rights, meaning that all humans across the globe hold human rights. To further the construction of rights as an entitlement, human rights may be accordingly defined as internationally guaranteed legal entitlements of an individual vis-a vis

1 Brian Orend, *Human Rights: Concept and Context* (Mississauga: Broadview Press, 2002), p. 15.

2 Andrew Clapham, *Human Rights : A Very Short Introduction* (Oxford: Oxford University Press, 2007), p. 19.

3 Gordon Di Giacomo, *Human Rights: Current Issues and Controversies* (Toronto: University of Toronto Press, 2016), p. xix. See also, Jack Donnelly, *Universal Human Rights in Theory and Practice*, (Ithaca, New York: Cornell University Press, (3 ed.), 2013), p 7.

4 Reeta Tremblay, James Kelly, Michael Lipson, & Jean Francois Mayer, *Understanding Human Rights: Origins, Currents, and Critiques* (Toronto: Nelson, 2008), p. 3.

the state, which serve to protect fundamental characteristics of rights and his or her dignity in peacetime and in times of armed conflict.⁵

Human rights have visibly gained importance after the Second World War with the Universal Declaration of Human Rights (UDHR), solemnly proclaimed by the United Nations General Assembly on 10 December 1948.⁶ Article 1 of the UDHR states a common standard of human rights whereby all human beings are born free and equal in dignity and rights.⁷ Also, Article 2 of the UDHR confirms that everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁸

After the post-war revolution, human rights protection has emerged and been accepted in international, regional, and national levels. As the UDHR was not adopted as a legally binding instrument, the UN started to gradually translate the content of the UDHR into binding treaty law. International human rights conventions were increasingly adopted, such as the Convention on the Prevention and Punishment of the Crime of Genocide 1948, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) 1984, and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) 1995.

The protection of human rights is generally recognized to be a fundamental aim of modern international law. After the Second World War, almost every regional and international organization has adopted human rights norms, and responded to human rights violations by opening avenues of redress for individuals whose rights have been violated without remedy in domestic law.⁹ The Council of Europe started improving its human rights system by adopting the European Convention

on Human Rights as early as 1950. The Americas developed its human rights system in response to massive violations caused by dictatorships in member states by adopting the Inter-American Convention on Human Rights in 1969.¹⁰ At the national level, the idea of establishing national human rights institutions was first conceived in 1946, and accordingly accepted in the Paris Principles adopted by the UN General Assembly in 1991.¹¹

Human rights require effective protection systems. The protection system of human rights come in the forms of institutions and procedures which serve to monitor and address violations of human rights. Human rights protection systems serve four main crucial functions.¹² First, human rights protection systems stop ongoing human rights violations by ensuring that action to do so is taken. Second, if violations cannot be stopped or if because of their nature they occur before intervention can be made, human rights protection systems help remedy such violations by ensuring reparations are made to the victims. Third, with respect to the violators, human rights protection systems allow them to be punished by creating obligations to prosecute the violators under binding law. Fourth, in addition to stopping human rights violations which are ongoing or addressing human rights which have occurred, human rights protection systems prevent new violations by ensuring that states are aware of their obligations to respect, protect and fulfil human rights.

The responsibility for implementing and enforcing human rights lies primarily with states as they are the first bearers of human rights obligations and are able to take necessary measures within their own territory. Human rights protection systems impose a set of binding obligations on states to “respect”, “ensure”, “secure”, and “prevent” rights of people.¹³ However, not all states acknowledge being subject to the international human rights norms or treaties. Moreover, UN treaty-monitoring bodies appear to operate in a quasi-judicial manner, albeit their decisions might not

⁵ Walter Kälin and Jörg Künzli, *The Law of International Human Rights Protection* (Oxford: Oxford University Press 2009), p. 32.

⁶ Rhona K. M. Smith, *International Human Rights Law* (Oxford: Oxford University Press, (8 ed.), 2018), p. 23.

⁷ The Universal Declaration of Human Rights 1948, article 1.

⁸ *Ibid*, article 2.

⁹ Dinah Shelton, *Remedies in International Human Rights Law* (Oxford: Oxford University Press, 2000), p. 1.

¹⁰ Ariel Dulitzky, ‘The Inter-American Human Rights System Fifty Years Later: Time for Changes’, *Quebec Journal of International Law* (Special Edition) (2011) 129.

¹¹ See <https://nhri.ohchr.org/EN/AboutUs/Pages/HistoryNHRIs.aspx>.

¹² Walter Kälin and Jörg Künzli, (n. 5), p. 183-184.

¹³ Christian Tomuschat, *Human Rights : Between Idealism and Realism* (Oxford: Oxford University Press, (2 ed.), 2008), p. 122-123.

be legally binding.¹⁴ Also, if we consider the domestic level, some violating states can control their national human rights institutions or commissions. Thus, protection against unlawful act of states is needed because international and national processes are perhaps insufficient, and those processes are not judicialized to the extent of the regional levels which can cause more impact, pressuring states into compliance.

2. Human Rights Violations and the Human Rights Protection System in ASEAN: Why is an Effective Regional Human Rights Protection System Important and Demanded?

International and national human rights protection systems do not always seem to be sufficient to monitor human rights and deal with violations. A main argument of this thesis defends the superiority of regional mechanisms over international and national mechanisms. This part provides an introduction on human rights in ASEAN. It first highlights examples of existing human rights violations in each ASEAN member state to illustrate the nature of human rights violations most commonly suffered in this region. Second, it provides an overview of the regional human rights protection system in ASEAN to determine what kinds of tools it has to deal with human rights violations in the region. Then, it discusses the human rights protection systems in other regions to ascertain how other regions deal with human rights violations in comparison with ASEAN. Finally, the literature on the performance of the ASEAN human rights system and the impediments to the development of the ASEAN human rights system will be discussed. This will show whether there are missing points which allow this research to make new contributions to.

2.1 Recent Human Rights Violations in ASEAN Member States

Human rights violations which have been occurring in ASEAN member states illustrated here will provide a context for why it is pertinent to embark on development of a regional human rights protection system in ASEAN, and to think about establishing a regional human rights court. The first situation exemplified here pertains to the alleged extrajudicial killings of drug dealers

in the Philippines. After taking office as president of the Philippines on 30 June 2016, Rodrigo Duterte declared a governmental campaign against illegal drugs which has publicly endorsed the extrajudicial killing of suspected drug dealers and drug users.¹⁵ Duterte has ignored calls for justice over the killing cases, and also said the killings show the success of his War on Drugs and urged police to continue implementing the policy.¹⁶

From 1 July 2016 to 30 September 2018, the Philippine Drug Enforcement Agency (PDEA) declared that 4,948 suspected drug users and dealers died during police operations.¹⁷ Also, the Philippine National Police (PNP) have recorded 23,518 Homicide Cases Under Investigation (HCUI), which means that approximately 33 people are killed in a day on average.¹⁸ Duterte vows to continue the anti-drugs campaign for the duration of his presidency which will end in 2022.¹⁹ He publicly stated that he will protect police officers and agents carrying out the “drug war” from prosecution, and saying “it will be as relentless and chilling as on the day it began.”²⁰

The second situation pertains to the deterioration of human rights in Thailand. In May 2014, a military coup took control of the government, and subsequently and increasingly clamped down on political dissent. The junta declared the National Council for Peace and Order (NCPO), and also a rubber-stamp National Legislative Assembly, overwhelmingly comprising junta supporters.²¹ In 2014, 476 anti-government activists have been arbitrarily arrested under the government’s orders.²² In 2018, at least 130 pro-democracy activists

15 Human Rights Watch. 2017. ‘Word Report 2017, Philippines: Events of 2016’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2017/country-chapters/philippines>.

16 Ibid.

17 Human Rights Watch. 2019. ‘Word Report 2019, Philippines: Events of 2018’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2019/country-chapters/philippines>.

18 Rambo Talabong, 2018. ‘At least 33 killed daily in the Philippines since Duterte assumed office’ Rappler, 17 December. Retrieved 15 January 2020, <https://www.rappler.com/newsbreak/in-depth/204949-pnp-number-deaths-daily-duterte-administration>.

19 Human Rights Watch, (n.17).

20 Ibid.

21 Human Rights Watch. 2015. ‘World Report 2015, Thailand: Events of 2014’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2015/country-chapters/thailand>.

22 ILaw. 2014. ‘Private property trespass report: arrest-search-interrogate-threaten-seize’, 13 August. Retrieved 15 January 2020, <https://ilaw.or.th/node/3207>.

14 Rhona K. M. Smith, (n. 6), p. 156.

in Bangkok and other provinces faced illegal assembly charges—and in some cases, sedition—for peacefully demanding the junta’s promised election to be held without further delay.²³

The junta continued to prosecute its critics under the Computer-Related Crime Act (CCA) under which at least 92 people have been charged since the 2014 coup.²⁴ Media outlets have faced punishment and closure because of the publication of information which is critical of the military government’s actions, and some have been routinely enforced censorship, and threatened due to raising issues considered to be sensitive to national security.²⁵ Under NCPO Orders, military authorities can secretly detain people for a wide range of offenses and hold them for up to seven days without charge, access to lawyers, or any safeguards against mistreatment.²⁶ The military government ignored requests to disclose information involved with activists held in military detention and summarily dismissed all allegations that soldiers had tortured or mistreated detainees.²⁷

Apart from the Philippines and Thailand which are two countries that will serve as case studies in this thesis, other ASEAN member states have also faced human rights violations whereby the authorities are the alleged perpetrators. In Myanmar, the most severe human rights violations relate to the persecution of the Rohingya people. The women, girls, boys and men in this ethnic minority have faced decades of systematic discrimination, statelessness and targeted violence in the State of Rakhine. According to the 2019 Human Rights Watch world report, more than 730,000 Rohingya have fled to neighboring Bangladesh since the military campaign of ethnic cleansing began in August 2017.²⁸ There is general agreement that the campaign arises from an ethnic conflict and gave rise to grave crimes against civilians by the Myanmar government.

Indonesia has mainly faced human rights issues involving religious and gender minorities who are continuously harassed such as by criminalization of same-sex sexual activities at the local level and violence against lesbian, gay, bisexual, transgender, and intersex (LGBTI) persons.²⁹ Authorities continue to arrest, prosecute, and imprison people under blasphemy law, and other complaints include allegations of torture by police and arbitrary detention by the government.³⁰

Freedom of expression and assembly issues mostly remain a concern in Malaysia.³¹ In May 2018, Malaysian authorities regularly prosecuted individuals who held peaceful assemblies without giving notice or participated in street protests.³² On the issue of religious rights, about 50 Shia, including children, were arrested in Kelantan for practicing their religion in September 2018.³³ The Communist Party of Vietnam took over power as government, and punished people who criticized or challenged its rule. In 2018, Vietnam put on trial at least 12 people for conducting propaganda against the state.³⁴ Also, in the same year in April, Communist Party-controlled courts severely sentenced five members of a group that called itself the Brotherhood for Democracy to between seven and 13 years in prison, on charges of threatening the Communist Party of Vietnam’s monopoly powers.³⁵

Prime Minister Hun Sen and his Cambodian People’s Party (CPP) have governed Cambodia since 1985. Human rights issues have been a concern for three decades under his regime. Even though the latest national election was recently held in July 2018, it was vitally flawed because Cambodians were denied their

23 Human Rights Watch. 2019. ‘World Report 2019, Thailand: Events of 2018’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2019/country-chapters/thailand>.

24 Ibid.

25 Spring News Online. 2019. ‘Breaking News : Voice TV 15 days of black screen likely, NBTC suspends broadcasting for criticizing Palung Pracharat’s nomination of the junta “Loong Too” for PM’, 12 February. Retrieved 15 January 2020, <https://www.springnews.co.th/news/440880>.

26 The National Council for Peace and Order 3/2015 and 13/2016.

27 Human Rights Watch, (n. 23).

28 Human Rights Watch. 2019. ‘World Report 2019, Myanmar: Events of 2018’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2019/country-chapters/burma>.

29 Human Rights Watch. 2019. ‘World Report 2019, Indonesia: Events of 2018’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2019/country-chapters/indonesia>.

30 United States Department of State. 2018. ‘Indonesia 2018 Human Rights Report’. Retrieved 15 January 2020, <https://www.state.gov/wp-content/uploads/2019/03/INDONESIA-2018.pdf>.

31 SUARAM. 2018. ‘Malaysia Human Rights Report 2018’, Retrieved 15 January 2020, <https://www.suaram.net/>.

32 Human Rights Watch. 2019. ‘World Report 2019, Malaysia: Events of 2018’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2019/country-chapters/malaysia>.

33 Ibid.

34 Human Rights Watch. 2019. ‘World Report 2019, Vietnam: Events of 2018’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2019/country-chapters/vietnam>.

35 Ibid.

right to liberally choose their representatives.³⁶ Media freedom came under assault whereby local independent newspapers or radio and TV channels collapsed, and their personnel were sentenced with criminal charges filed for posts to Facebook critical of the government.³⁷ In Laos, enforced disappearances of human rights activists is a scandalous issue which the government failed to make justice be seen to be done. A well-known case concerned Sombath Somphone, a prominent civil society member who was abducted in 2012. CCTV cameras captured him being stopped by police and driven away.³⁸

In Singapore, freedoms of peaceful assembly and expression is restricted. Activists were prosecuted in 2018 for violating the Public Order Act for organizing two peaceful protests, and scandalizing the judiciary for posting on social media “Malaysia’s judges are more independent than Singapore’s for cases with political implications.”³⁹ Also, in Brunei Darussalam, the smallest country in ASEAN, freedom of expression especially pertaining to religion is violated. For example, in July 2018, the government charged its employee under Section 4(1)(c) of the Sedition Act due to posting content on Facebook deemed “offensive” to the Ministry of Religious Affairs.⁴⁰

The above highlights the more prominent cases of human rights violations which have occurred and are still ongoing in each ASEAN country. In reality there are more cases in which civilian human rights are still violated by governments, state leaders, and other authorities who do not fear of any sanctions. Significantly, national legal systems do not play sufficient roles to protect people’s rights. Existing NHRIs are not able to deal with all cases, particularly those which involve state violators. Consequently, the public and victims themselves are not satisfied with the national human rights system which should in theory protect their rights,

36 Human Rights Watch. 2019. ‘World Report 2019, Cambodia: Events of 2018’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2019/country-chapters/cambodia>.

37 Freedom House. 2019, ‘Freedom in the World 2019: Cambodia’. Retrieved 15 January 2020, <https://freedomhouse.org/report/freedom-world/2019/cambodia>.

38 Amnesty International. 2018. ‘Amnesty International Report: Laos 2017/2018’. Retrieved 15 January 2020, <https://www.amnesty.org/en/countries/asia-and-the-pacific/laos/report-laos/>.

39 Human Rights Watch. 2019, ‘World Report 2019, Singapore: Events of 2018’. Retrieved 15 January 2020, <https://www.hrw.org/world-report/2019/country-chapters/singapore>.

40 Amnesty International. 2018. ‘Amnesty International Report: Brunei Darussalam 2017/2018’. Retrieved 15 January 2020, <https://www.amnesty.org/en/countries/asia-and-the-pacific/brunei-darussalam/report-brunei-darussalam/>.

but has not been able to in reality. This means an effective regional human rights institution is really needed to fill this gap and protect rights of the peoples of ASEAN.

2.2 In Light of such Human Rights Violations, What Human Rights Protection System does ASEAN have?

As of 2019, it has been fifty-two years that the Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. This supranational organization consists of ten Southeast Asian states whereby Indonesia, the Philippines, Singapore, Thailand, and Malaysia are the five founding states. Five countries which are Brunei, Vietnam, Laos, Myanmar, and Cambodia then joined respectively. The purpose of this integration was mainly to diminish territorial and political dispute, promoting regional stability and limiting competition between member states.⁴¹ Reducing the appeal of internal Communist insurgencies, and accelerating economic growth were also cited as purposes of the formation.⁴² The main institutional decision making of ASEAN is coordinated by the Annual Ministerial Meeting (AMM) of the ASEAN foreign ministers which take place annually in each of the ASEAN member states.

With respect to human rights protection at the domestic level, it has to be mentioned that National Human Rights Institutions (NHRIs) are present only in some of the ASEAN member states. These institutions may appear under the title NHRI or under another designation depending on the respective country. As of 2019, five ASEAN member states — the Philippines, Indonesia, Malaysia, Thailand, and Myanmar – have a NHRI which plays an indispensable role in promoting and protecting human rights. However, upon scholarly assessment of such NHRIs with respect to the implementation of the Paris Principles, it was found that there is still room to improve in terms of the NHRI’s legal mandates, composition, and independence to make them able to more effectively deal with human rights violations.⁴³ For example, the

41 Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (London: Lynne Rienner Publishers, 2002), p. 2-4.

42 Ibid.

43 Hugo Stokke, 2007. ‘Taking the Paris Principles to ASIA, A Study of Three Human Rights Commissions in Southeast Asia: Indonesia, Malaysia and the Philippines’, CMI Report. Retrieved 29 November 2019, www.cmi.no/publications/2680-taking-the-paris-principles-to-asia.

NHRI of Myanmar (Myanmar National Human Rights Commission) was only established in 2011, and is weak with respect to its ability to address human rights violations in Myanmar.⁴⁴ Moreover, in reality, all national human rights institutions in ASEAN are dependent on governments which play a role as financial supporters of the NHRI. It is noted that NHRIs are supposed to be independent from the government, but in reality they do not perform and work on their mandates against the government or state leaders who are violators.

At the regional level, the World Conference on Human Rights 1993 held in Vienna marked a time when ASEAN member states started to become more active on human rights development. Human rights was a topic of discussion at the 1995 AMM and by virtue of such meeting, the Working Group for an ASEAN Human Rights Mechanism whose primary goal is to establish a regional human rights body for ASEAN was created.⁴⁵ The first official proclamation of such endeavor to establish a regional human rights institution was Article 14 of the ASEAN Charter 2007 which stipulates in paragraph 1 that ASEAN shall establish an ASEAN human rights body “in conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms.” Article 14(2) of the ASEAN Charter further provides that a document called the Terms of Reference, determined by the ASEAN Foreign Ministers Meeting, shall govern the operation of the intended ASEAN human rights body.

As a result of that, ASEAN member states established in 2009 the ASEAN Intergovernmental Commission on Human Rights (AICHR), to be an agent to promote and protect the rights of people. The AICHR then as a key actor adopted another human rights instrument for ASEAN which is the ASEAN Human Rights Declaration (AHRD) in 2012. These two instruments comprise the main features of the ASEAN human rights system. Nevertheless, the current discussion on human rights in ASEAN points to the ineffectiveness of such existing instruments whereby they have been criticized for lacking the actual capacity to deal with the human rights violations which have occurred in the region for a decade.

⁴⁴ Niki Esse de Lang, ‘The Establishment and Development of the Myanmar National Human Rights Commission and Its Conformity with International Standard’, *Asia-Pacific Journal on Human Rights and The Law* 13(1) (2012) 1-41.

⁴⁵ See <https://www.aseanhrmech.org/>.

It has been clearly established that ASEAN’s human rights protection system is still in need of institutional development.⁴⁶ This thesis points out that when international legal treaties such as the Rome Statute, do not bind all ASEAN member states due to not signing and ratifying, and also when existing NHRIs are insufficient, a regional mechanism is needed. Thus, for ASEAN, this research argues that a stronger AICHR or regional human rights court will fill the gap of protection mechanism and help to end the mentioned human rights abuses. Moreover, judicial-related powers which the AICHR lacks should be available to it as in human rights commissions in other regions. The AICHR’s weakness needs to be remedied. Because of the absence of an effective regional human rights institution like a court as in Europe, America, and Africa, many human rights violations in ASEAN member states, especially those committed or sponsored by state leaders or governments, have been left unadjudicated. In other words, ASEAN member states have not been held accountable by a regional human rights court declaring the state to be in violation of its obligation to uphold human rights pursuant to human rights law.

2.3 In Comparison with ASEAN, How do Other Regions deal with Human Rights Violations?

This section will provide a brief overview of human rights protection systems in other regions to ascertain what tools they have to monitor human rights issues, and how they deal with human rights violations. Comparative explanations here will be very useful for ASEAN whereby advantages of those regional systems can be drawn and drawbacks can be learned as a lesson in developing ASEAN’s own human rights protection system. For example, an advantage of the European system is how the Council of Europe built its human rights protection system so quickly, which has been effectively working until the present. An advantage of the Inter-American system concerns the significant involvement of civil society organizations (CSOs) during the process of establishing the Inter-American Court

⁴⁶ Li-Ann Thio, ‘Implementing Human Rights in ASEAN Countries: Promises to keep and miles to go before I Sleep’, *Yale Hum. Rts. & DEV. L.J.*, (2) 15-25. Hien Bui, ‘The ASEAN Human Rights System: A Critical Analysis’, *Asian Journal of Comparative Law*, 11(1) (2016) 111-140. Hao Duy Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia* (Leiden: Martinus Nijhoff Publishers, 2012).

of Human Rights. However, since the histories of the European and Inter-American systems clearly differ from the history of ASEAN, the possibility for the latter to learn lessons from the former could be limited. Also, ASEAN faces various problems relating to the different wills of governments of its member states, their budgets, and further differences between the individual member states of ASEAN.

Europe is the first region in the world that created regional human rights institutions. The Council of Europe (CoE) produced a major treaty to guarantee human rights—the European Convention for the Protection of Human Rights and Fundamental Freedoms, also known as the European Convention on Human Rights (ECHR), which came into force (in its initial form) in 1953. The CoE then accelerated the establishment of its regional human rights institutions. Within six years from the Convention's entry into force, the European human rights system came into function with the European Commission on Human Rights established in 1954 and the European Court of Human Rights (ECtHR) in 1959. However, the Commission became obsolete in 1998 with the restructuring of the Court which presently alone deals with cases of human rights violations filed by individuals who believe their human rights have been violated, and are unable to be remedied by the national legal system.⁴⁷

In the Inter-American system, the Organization of American States (OAS) established the Inter-American Commission on Human Rights (the Commission, or IACHR) in 1959. Then, OAS adopted the American Convention on Human Rights (the American Convention) in 1969 which called for the establishment of the Inter-American Court of Human Rights (the Court), which began operating in 1979. These two regional human rights institutions are similarly charged with protecting human rights, but play different complementary roles. The Commission works as the initial step in the admissibility process for human rights complaints, receiving petitions, investigating cases, and requesting provisional measures before the Court.⁴⁸ The Court resolves human rights cases, and can also issue advisory views on specific questions of law related to human rights.

47 Janneke Gerards, *General Principles of the European Convention on Human Rights* (Cambridge: Cambridge University Press, 2019) 9-11.

48 Thomas M. Antkowiak, Alejandra Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford: Oxford University Press, 2017) 8-9.

Individuals are not permitted direct access to the Court. They have to first submit their complaints to the Commission and go through the procedure for cases before the Commission.⁴⁹

With respect to the African system, the Organisation of African Unity (OAU) adopted the African Charter on Human and Peoples' Rights (also known as the Banjul Charter) in 1981. This Charter took five years until ratifications by an absolute majority of member states of the OAU were achieved, putting the Charter into force on 21 October 1986. The African Charter established the African Commission on Human and Peoples' Rights which was inaugurated in 1987. The Commission ensures protection of human and peoples' rights through its communication procedure, friendly settlement of disputes, state reporting (including consideration of NGOs' shadow reports), urgent appeals and other activities of special rapporteurs and working groups and missions.⁵⁰ Individuals and NGOs may approach the Court indirectly, by first submitting a communication to the Commission.⁵¹ If the Commission concluded the case on its merits, finding a violation against a state party to the Charter, it may refer the case to the Court if the state fails to comply with the Commission's findings.⁵²

It can be seen that in those regions, when rights have been violated, people have the possibility to access the justice system by firstly lodging their complaints to the system. Then, cases will be investigated and considered, and a solution and compensation will be ultimately provided. As a result, regional human rights mechanisms can take steps to prevent and stop violations, and then provide reparations and determine accountability to make certain that such violations are not repeated. Thus, to effectuate human rights protection in ASEAN, a judicial body is indispensable for the purposes of investigating, prosecuting, and issuing legally binding decisions with respect to human rights violations-- a function which the existing institutions are not fully equipped to do.

49 Ibid, 11-13.

50 Center for Human Rights, *A Guide to the African Human Rights System: Celebrating 30 years since the entry into force of the African Charter on Human and Peoples' Rights 1986 – 2016* (Pretoria: Pretoria University Law Press (PULP)), 12. See also the African Charter on Human and Peoples Rights, Article 45.

51 Ibid.

52 Ibid, 45.

The table below illustrates in summary the regional human rights instruments of each region namely Europe, the Inter-Americas, Africa and ASEAN in terms of the development of the regional human rights system in comparison to ASEAN where a regional human rights court is absent.

Table 1: Regional Human Rights Instruments in Each Region of the World

Region	Regional Human Rights Instruments		
	Human Rights Convention	Human Rights Commission	Human Rights Court
Europe	The European Convention on Human Rights (ECHR) 1953	Abolished in 1998	The European Court of Human Rights (ECtHR) 1959
Inter-America	The American Convention on Human Rights 1969	The Inter-American Commission on Human Rights (IACHR) 1959	The Inter-American Court of Human Rights (IACtHR) 1979
Africa	The African Charter on Human and Peoples' Rights. 1986	The African Commission on Human and Peoples' Rights 1987	The African Court on Human and Peoples' Rights 2004
ASEAN	Only 'Declaration' The ASEAN Human Rights Declaration 2012	The ASEAN Intergovernmental on Human Rights (AICHR) 2009	N/A

2.4 Literature on the Performance of the ASEAN Human Rights System and the Impediments to the ASEAN Human Rights System's Development

The main scholarly discussion on the performance of the ASEAN human rights system comes after the creation of the two human rights mechanisms, the AICHR and the AHRD. James Gomez evaluated the AICHR by looking at the outcry over the recently adopted Terms of Reference (ToR) of the AICHR. He referred to many critics' attitude pointing to the "toothless" character of this supranational organization, and citing the absence of important powers such as the ability to carry out investigations for the AICHR.⁵³ Hien Bui highlighted the weakness in the mandates given to the AICHR.⁵⁴ She exemplified the weakness through the

⁵³ James Gomez, 'Introduction: Democracy and Human Rights in Southeast Asia', *Journal of Current Southeast Asian Affairs* 33(3) (2014), 3–17.

⁵⁴ Hien Bui, 'The ASEAN human rights system: a critical analysis' *Asian Journal of Comparative Law* 11 (1) (2016), 111–140.

recent case of human rights violations in Thailand and Myanmar, and argued that the AICHR played insufficient roles in the situation of these two countries because the AICHR lacks independence from governments and has weak protection mandates.⁵⁵

As stipulated in the ToR of the AICHR, this Commission has government-appointed representatives as opposed to independent experts. James Gomez and Robin Ramcharan claimed that the AICHR lacks a protective mandate because neither the ASEAN Charter nor the ToR of the AICHR authorizes it to receive complaints and investigate allegations of human rights violations.⁵⁶ The reason behind such lack of protective mandate is because the ASEAN member states involved in the decision-making process of establishing the AICHR did not want the AICHR to be able to legally bind them.⁵⁷

On the one hand there is a general agreement on a negative note that the current human rights system in ASEAN is not effective. However, on the other hand, a number of scholars have remarked on a more positive note about the development of the ASEAN human rights system. Gerard Clarke compares the development of the ASEAN human rights system with that of other regions. He notes that the progress in ASEAN is similar to the progress in other regions in terms of having a human rights body which began as a political construct, before developing into an authoritative law-making and law-enforcing body.⁵⁸ Hsien-Li Tan takes a similar view, positing that the existing regional human rights instruments in ASEAN can progress further such that the AHRD can be transformed into the ASEAN Convention on Human Rights, and the ASEAN Court of Human Rights will then be established.⁵⁹

Development of the ASEAN human rights system has been slow. Scholars have discussed the main factors which have been hindering the

⁵⁵ Ibid, 113.

⁵⁶ James Gomez & Robin Ramcharan, 'The Protection of Human Rights in Southeast Asia: Improving the Effectiveness of Civil Society, *Asia-Pacific Journal on Human Rights and the Law* (2013).

⁵⁷ Ibid.

⁵⁸ Gerard Clarke, 'The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012, *Northwestern Journal of International Human Rights* 11(1) (2012), 25.

⁵⁹ Hsien-Li Tan, *The ASEAN Intergovernmental Commission on Human Rights: Institutionalizing Human Rights in Southeast Asia* (Cambridge University Press, 2011).

development of the human rights system in this region. The first impediment that has been widely discussed is the diversity within ASEAN. Li-ann Thio remarked that the lack of a shared historical past and the varied political ideologies, legal systems, cultural-religious traditions, and levels of economic development among Southeast Asian countries constitute a barrier to developing the human rights system as a whole.⁶⁰ She came to this point by recording the data of human rights cases which have been submitted to the National Human Rights Commission in each member states. The varied causes of human rights abuses is indicative of the diverse religions, cultural, and political background of the countries.⁶¹ Southeast Asian countries are diverse as regards their size, economic development, ethnicity, socio-cultural heritage and history.⁶²

The view of ASEAN's political leaders has been cited as the second main obstacle in human rights development in this region. Many ASEAN governments believe that individual rights must give way to the demands of national security and economic growth.⁶³ They believe that duties or responsibilities to the state and to other citizens come before the need to respect individual human rights.⁶⁴ ASEAN government leaders' perceptions and attitudes have still been an appealing issue of discussion within the topic of human rights development. This is reflected in official documents such as the Joint Communiqués of the ASEAN Foreign Ministers' Meeting (AMM).

For example, the Joint Communiqué of the 25th AMM in 1992 states: *'Basic human rights, while universal in character, are governed by the distinct culture and history of, and socio-economic conditions in each country, and that their expression and application in the national context are within the competence and responsibility of each country'*.⁶⁵ This research has observed

that from 1992 to the present, this political view still prevails.⁶⁶ In the last ten years of the Joint Communiqué of the AMM, there has been neither a discussion on the strengthening of the existing institutions such as the AICHR, nor one on the establishment of a new regional human rights institution. Thus, this means that if the political wills of the ASEAN governments are not concerned about human rights institution development, this issue might not reach the agendas of ASEAN.

The final main hindrance is the existence of a non-interference policy. Sriprapha, through the observance of the main ASEAN documents, found that the development of human rights in this region is based on at least two pillars: the written norms of non-interference and the principle of consensus.⁶⁷ The documents she had studied include the 1976 Treaty of Amity and Cooperation in Southeast Asia and the ASEAN Charter. As an example, she mentioned that article 2, paragraph 2 of the ASEAN Charter in which the principle was stipulated, emphasizes: respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN member states; non-interference in their national affairs; and respect for the right of every member state to lead its national existence free from external interference, subversion and coercion.⁶⁸

ASEAN's golden rule of non-interference has been a strict tradition to avoid that the member states criticize each other's internal affairs, particularly those directly related to the issue of human rights.⁶⁹ The non-interference principle is even mentioned in Article 2.1(b) of the ToR of AICHR. The latter detail confirms that this principle is the main concern of ASEAN member states which they would like to prioritize over the human rights agenda. Arubakar added that ASEAN's fundamental principles of non-intervention are one of the

60 Li-ann Thio, 'Implementing Human Rights in ASEAN Countries: "Promises to keep and miles to go before I sleep"', Yale Human Rights and Development Journal 2 (1) (1999).

61 Ibid, 12.

62 Ibid.

63 Sriprapha Petcharamesree, 'The ASEAN Human Rights Architecture: Its Development and Challenges', The Equal Rights Review 11 (2013), 56.

64 Ibid.

65 See https://asean.org/?static_post=joint-communique-25th-asean-ministerial-meeting-manila-philippines-21-22-july-1992, para 18.

66 Hao Duy Phan, 'Institutions for the Protection of Human Rights in Southeast Asia: A Survey Report', Contemporary Southeast Asia 31(3) (2009), 468–501; Vitit Muntarbhorn, 'Unity in Connectivity? Evolving Human Rights Mechanisms in the ASEAN Region' (Leiden: Martinus Nijhoff Publisher, 2013), p. 200.

67 Sriprapha Petcharamesree, (n 64).

68 Ibid, 55.

69 Pavin Chachavalpongpun, 2018. 'Is Promoting Human Rights in ASEAN an Impossible Task? Developments in the region suggest that the goal remains far from becoming a reality anytime soon', the Diplomat, 19 January. Retrieved 15 January 2020, <https://thediplomat.com/2018/01/is-promoting-human-rights-in-asean-an-impossible-task/>.

impediments to an effective functioning of the AICHR.⁷⁰ This situation created difficulties in reaching agreements on improving the AICHR itself to have more effective mandates in dealing with human rights violations.⁷¹

3. Research Questions and Thesis Outline

Bearing in mind the previous background, the overarching research question of this thesis is:

- ***How can ASEAN develop an effective human rights protection system, especially a regional human rights court to deal with human rights violations?***

To answer the main research question, this thesis is divided into four chapters, which arose from interdisciplinary research on the crossroad between law and political science. Each chapter constitutes a step which investigates and explains the legal and policy aspects involved with the development of the human rights protection system in ASEAN. The overarching research question is examined in four sub-questions addressed in chapters 2, 3, 4 and 5 as follows:

- i) ***Chapter 2: To what extent does the law provide protective capacity to the Philippines and Thai NHRIs in dealing with human rights violations? How have the governments of the Philippines and Thailand impacted the performances of their NHRIs in carrying out human rights protection work?***

This chapter comparatively analyses the human rights protection system at the national level in the Philippines and Thailand as exemplifying case studies. It focuses on the NHRIs of the two countries—the Commission on Human Rights of the Republic of the Philippines (CHRP), and the National Human Rights Commission of Thailand (NHRCT), to comparatively study their legal mandates as provided by relevant laws. Also, this chapter identifies limits to the performances of the NHRIs caused by the governments and state leaders of both countries. This chapter begins

with a comparative discussion of the legal mandates of the CHRP and NHRCT by analyzing the following protective mandates: (1) to receive complaints, (2) to make complaints to an inquiry officer, (3) to investigate, (4) to protect witnesses, (5) to prosecute, (6) to make recommendations and suggest remedial measures, (7) to visit detention facilities, and (8) to provide financial aid.

Then, it focuses on the limits to the performances of both NHRIs in terms of how the governments of the Philippines and Thailand have impacted the actual exercise of their NHRI's protective mandates. This part tries to illustrate that the performance of mandates of both NHRIs is still hindered by their governments whose policy and political wills are not pro-human rights. The purpose of this chapter is to illustrate how sufficient NHRIs are to protect and deal with human rights violations, and how such NHRIs perform their mandates if they face with a powerful perpetrator like governments or state leaders. Also, it paves the way to make a coherent argument with other chapters pointing out that domestic human rights protection systems are weak, and that member states of ASEAN should move forward to develop an effective regional human rights protection system and an institution like a regional human rights court.

- ii) ***Chapter 3: How did ASEAN demand the creation of a regional human rights institution as an agent to deal with human rights issues? How has the AICHR expanded their role over time to significantly contribute to the improvement of human rights in Southeast Asia?***

This chapter looks back to the beginning period of the establishment of a regional human rights institution in ASEAN. It points out why ASEAN needed to establish a regional human rights body which is the AICHR, and how it was designed. In this chapter, the principal-agent theory takes center stage and is illustrated to show the linkage of state members and regional human rights institutions. The principle-agent theory is applied to make an argument that ASEAN as principal actually raised awareness on establishing a regional human rights institution as an agent to deal with human rights issues. Although, the development of the AICHR seems not sufficient to deal with human rights violations because this institution lacks powerful mandates and protective functions.

⁷⁰ Abubakar Eby Hara, 'The struggle to uphold a regional human rights regime: the winding role of ASEAN Intergovernmental Commission on Human Rights (AICHR)', *Revista Brasileira de Política Internacional* 12(1) (2019).

⁷¹ Ibid.

However, the AICHR's establishment shows a huge improvement in terms of human rights in this region which proves that member states cooperated to set up their regional human rights body. The creation of the AICHR demonstrates that a regional human rights institution was highly imperative. This point can be a paradigm for the future development towards a next regional human rights institution which will have more protective mandates. Additionally, this chapter shows more about the AICHR itself as to what it has conducted after having been established. In particular, it looks at why the AICHR is important and how this institution as a delegate of human rights of ASEAN has expanded its role and power over time beyond the strict principle-agent model in order to improve human rights issues, especially in terms of a more protective function which, however, has also been its weakness. The chapter shows that the AICHR is slowly trying to act further than its mandates beyond a strict principal-agent relationship with the signatory states. Here, it can be argued that future improvements towards the establishment of a regional human rights court in ASEAN could be achieved if the AICHR strengthens itself, and works independently to pressure ASEAN member states to realise the idea of establishing a court.

iii) Chapter 4: How could Civil Society Organizations (CSOs) play a role to help end human rights violations if the existing regional human rights institution—in this case the AICHR—does not have powerful mandates to deal with human rights violations? What are the results of such CSO performances?

This chapter aims to illustrate the roles of civil society organizations (CSOs) in terms of ending human rights violations occurring in ASEAN member states. As chapter 2 and 3 show that NHRIs (national level) and the AICHR (regional level) do lack of protective function, and are weak in dealing with human rights violations, this chapter argues that CSOs can be a key actor to help mitigate human rights abuses caused by governments and/or state leaders because CSOs are independent organizations, and do not rely on states. In this chapter, the concept of human rights norm diffusion is illustrated to ascertain how CSOs work to end the case of extrajudicial killing of drug dealers and users in the Philippines in President Duterte's regime.

The chapter applies the boomerang model of Margaret E. Keck and Kathryn Sikkink to the extra judicial killing cases which show that CSOs work as a key dynamic of the boomerang model to diffuse information and reach international organizations which have protective powers to put pressure back to the violating state—the Philippines—to stop the extrajudicial killing. In particular, this chapter shows that when an existing regional human rights institution—in this case the AICHR—is complacent and unable to stop the human rights violation and protect victims, CSOs find other regional and international allies, in this case bypassing the role of the AICHR. Through the Philippine case study, the chapter shows how CSOs reached the United Nations Office on Drugs and Crime (UNODC) and the International Narcotics Control Board (INCB) to put pressure on President Duterte, and reached the International Criminal Court (ICC) which finally opened a preliminary examination on such human rights violations in the Philippines, testifying to the result of the boomerang model.

iv) Chapter 5: How have CSOs been mobilizing to strengthen the regional human rights protection, and establishing a regional human rights court? What has the AICHR been doing to strengthen human rights protection in the region, especially its legal mandates, and eventually to establish an effective legally binding human rights institution—a court in ASEAN?

This chapter is the final analysis part before the thesis comes to a conclusion. It contributes a new way to implement the idea of establishing a regional human rights court in ASEAN. This chapter focuses on how the court can be built if ASEAN member states do not pursue such task in a timely manner. The argument of this chapter is to resort to the mobilization of CSOs in trying to build a regional human rights court when member states have not shown a keen interest in so doing. An argument here is also that establishing a regional human rights court in ASEAN seems to be a sensitive step because member states who can be considered violators of human rights of their citizens are very reluctant to accept this idea because a court might take action which adversely affects the state.

Two examples, one from the European and one from the Inter-American human rights system are illustrated in the literature review in this chapter on how

keenly such systems were created, and how CSOs were involved during those processes, especially in the Inter-American system. This can be applied for ASEAN, a region in which CSOs are very active, have pressured member states in various ways, and have engaged with the AICHR to the greatest extent possible to realize the idea of establishing a court. This chapter also demonstrates that the AICHR has been moving forward step by step to strengthen itself, as evidenced by vital performances of some AICHR representatives. Their interaction with CSOs have revealed an attitude that the protection system and a more effective human rights institution such as a court are needed to deal with urgent human rights violations in Southeast Asian countries.

4. Aims and Contribution of the Research

As mentioned in the previous sections, there is a weakness in the ASEAN human rights protection system, especially with respect to the lack of judicial powers to deal with human rights violations. Existing instruments like the AICHR and AHRD are in need of development. It has also been suggested that a regional human rights court for ASEAN be established.⁷² However, it remains unclear how ASEAN itself, or stakeholders, can develop ASEAN's human rights system and establish a more effective human rights mechanism, such as the suggested ASEAN human rights court. Uncertainty also persists as to which specific actors can undertake that role and what kind of contribution can they make towards achieving the aforementioned goal.

In addition to contributing to the discussion on ASEAN's need to improve its regional human rights system, this thesis submits that the major weaknesses of the existing instruments are their lack of legal binding force, and the lack of power to investigate and enforce upon human rights violators. Making a case for ASEAN to accelerate the establishment of a more effective regional human rights institution to remedy the absent functions of existing instruments, the aim and contribution of this research is to support that in order to both promote and provide human rights protection, certain institutions should be created and society mobilized.

⁷² Hao Duy Phan, *A Selective Approach to Establishing a Human Rights Mechanism in Southeast Asia: The Case for a Southeast Asian Court of Human Rights* (Leiden: Nijhoff Publishers, 2012), 101.

Existing NHRIs should work independently from governments. Countries without an NHRI should then establish their own respective NHRIs. Importantly, existing regional institutions such as the AICHR should be strengthened, and the role of society in human rights norm diffusion emphasized. This thesis supports the role of civil society organizations (CSOs) in pressing governments and mobilizing society to expand the powers of regional institutions and possibly create a court of human rights in ASEAN.

The efforts and co-operation of CSOs which work together with the AICHR, NHRIs, and external organizations, as well as the human rights related projects in which they mobilize, will be the social significant interest in order to ascertain how their future work could contribute to the improvement of the ASEAN human rights protection system, and how the NHRIs, AICHR, norm diffusion, and the proposals to establish a regional court fit together to suggest that a stronger institutional protection for human rights is being built in ASEAN. This provides the themes of the whole dissertation, the importance of increased institutionalization of human rights in ASEAN for the protection of people, at the national and regional levels, with civil society mobilization pressing institutional and society through norm diffusion for expanded regional human rights enforcement.

5. An Interdisciplinary Approach and Methodological Considerations

In addition to substantive investigations, this thesis uses hybrid methodologies conducted as an interdisciplinary research within two academic disciplines namely law and political science. The main focus of this work is primarily on the development of regional human rights system in particular in an institutional approach. Thus, it is inevitable to study literature, theory, and practical matters of both legal and political fields. These two insights will support each other to help find answers to the research questions, and guide the future academics, lawyers, and policy makers to make future relevant steps. Having the law in books is definitely not sufficient to improve human rights systems particularly in ASEAN, strengthening policy matters in parallel is also very significant.

Inevitably, this thesis will be using a mixed methodology of legal and political science styles. It relies on analyses of legal documents and also utilizes